

1 KAREN P. HEWITT
United States Attorney
2 CHRISTOPHER P. TENORIO
Assistant U.S. Attorney
3 California State Bar No. 166022
880 Front Street, Suite 6293
4 San Diego, California 92101-8893
Telephone: (619) 557-7843
5 Christopher.Tenorio@usdoj.gov

6 Attorneys for Plaintiff
United States of America
7

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,	)	Criminal Case No. 07CR3021-WQH
)	
11 Plaintiff,	)	DATE: February 4, 2008
	)	TIME: 2:00 p.m.
12 v.)	
	)	GOVERNMENT'S RESPONSE IN
13 PEDRO CRUZ-TERCERO,	)	OPPOSITION TO DEFENDANT'S
	)	MOTIONS:
14 Defendant.)	
	)	1) COMPEL DISCOVERY;
15	)	2) FILE FURTHER MOTIONS;
	)	3) DISMISS INDICTMENT FOR
16	)	FAILURE TO ALLEGE ESSENTIAL
	)	ELEMENTS;
17	)	4) SUPPRESS STATEMENTS;
)	
18	)	TOGETHER WITH STATEMENT OF FACTS
	)	AND MEMORANDUM OF POINTS AND
19	)	AUTHORITIES
20)	

21 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through
22 its counsel, Karen P. Hewitt, United States Attorney, and Christopher
23 P. Tenorio, Assistant United States Attorney, and hereby files its
24 response and opposition to Defendant's above-referenced motions. Said
25 response is based upon the files and records of the case, together
26 with the attached Statement of Facts and Memorandum of Points and
27 Authorities.

28 //

I.

STATEMENT OF FACTSA. PRESENT OFFENSE

On October 16, 2007, at approximately 3:45 a.m., Border Patrol Agents Jason Wardlow and Daniel Alvarado encountered Defendant Pedro Cruz-Tercero driving a white 1995 Ford Econoline van on Highway 76. The agents knew that the area where Defendant was driving is a route commonly used by alien smugglers to circumvent the I-15 Border Patrol checkpoint. The van sped up as it passed the agents. The agents lost sight of the van for approximately 30 minutes, but later found it parked with its doors open. After 10 minutes, the agents responded to sounds in nearby brush and located Defendant.

Agent Wardlow identified himself as a Border Patrol Agent. Pursuant to an immigration inspection, Defendant stated that he was the driver of the van and that he was a Mexican citizen with no immigration documents to permit him to be or remain in the United States. The agents arrested Defendant and transported him to the Murrieta Border Patrol Station.

At the station, at approximately 5:45 a.m., Agent Alvarado advised Defendant of his Miranda rights, which Agent Wardlow witnessed. At 7:45 a.m., Defendant made a video-taped statement in which he admitted his prior convictions and that had not applied for readmission into the United States.

Defendant was subsequently indicted on November 7, 2007 for Deported Alien Found in the United States, in violation of Title 8, United States Code, Section 1326(a) and (b).

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1 **B. PRIOR HISTORY**

2 **1. Criminal History**

3 Defendant's prior criminal convictions include the following.
4 On January 21, 2000, Defendant was convicted on of Assault of a Person
5 with a Semi-automatic Firearm (felony), in violation of California
6 Penal Code § 245(B), in the Superior Court of San Diego County.
7 Defendant was sentenced to three years probation and 270 days in jail.
8 Defendant's probation was revoked on October 18, 2001, and he was
9 sentenced to six years of prison.

10 On October 15, 2001, Defendant was convicted of Possession of a
11 Controlled Substance, in violation of California Health and Safety
12 Code § 11377(A), in the Superior Court of San Diego County. Defendant
13 was sentenced to four years in prison.

14 **2. Immigration History**

15 Defendant was previously ordered deported on March 12, 2001.
16 Defendant was most recently deported on February 16, 2005 through
17 Calexico, California.

18 **II.**

19 **POINTS AND AUTHORITIES**

20 **A. THE GOVERNMENT WILL PROVIDE DISCOVERY AS PROVIDED HEREIN**

21 Except as described below, the Court should deny Defendant's
22 discovery requests.

23 **1. Rule 16(a)(1)(A): Defendant's Statements.**

24 The Government has disclosed all known written and statements
25 of the Defendant and the substance of oral statements made by the
26 Defendant in response to questions by government agents in this
27 case.

28 //

1 **2. Documents, Arrest Reports, and Tangible Evidence.**

2 In accordance with obligations under Rule 16(a)(1)(C) and
3 16(c), the Government will permit the Defendant to inspect and copy
4 or photograph all books, papers, documents, photographs, tangible
5 objects, buildings, or places, or portions thereof, which are
6 within or may come within the possession, custody, or control of
7 the Government, and which are material to the preparation of the
8 Defendant's defense or are intended for use by the Government as
9 evidence-in-chief at trial or were obtained from or belong to the
10 Defendant.

11 **3. Rule 16, and Brady: For Exculpatory Evidence.**

12 The Government is well aware of, and will fully perform, its
13 duty under, Brady v. Maryland, 373 U.S. 83 (1963), and United
14 States v. Agurs, 427 U.S. 97 (1976). Accordingly, the Government
15 will disclose exculpatory evidence within its possession that is
16 material to the issue of guilt. Defendant is not entitled to all
17 evidence known or believed to exist which is, or may be, favorable
18 to the accused, or which pertains to the credibility of the
19 Government's case. As the Ninth Circuit Court of Appeals stated in
20 United States v. Gardner, 611 F.2d 770 (9th Cir. 1980):

21 [T]he prosecution does not have a constitutional duty to
22 disclose every bit of information that might affect the
23 jury's decision; it need only disclose information
favorable to the defense that meets the appropriate
standard of materiality.

24 Id. at 774-75 (citations omitted). See also United States v.
25 Sukumolachan, 610 F.2d 685, 687 (9th Cir. 1980) (the Government is
26 not required to create non-existent exculpatory material); United
27 States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976) (Brady does not
28 create any pretrial discovery privileges not contained in the

1 Federal Rules of Criminal Procedure).

2 **4. Rule 16, and Brady: For Sentencing.**

3 The Government is also well aware of, and will fully perform,
4 its duty under Brady v. Maryland, 373 U.S. 83 (1963) and United
5 States v. Agurs, 427 U.S. 97 (1976) regarding evidence pertaining
6 to punishment. Accordingly, and consistent with its position
7 stated above, the Government will disclose exculpatory evidence
8 within its possession that is material to the issue of punishment.

9 **5. Rule 16(a) (1) (A), (B), and (C): Prior Record**

10 The Government has already provided Defendant with arrest
11 reports, judgment and conviction documents for prior offenses and
12 other evidence of prior bad acts pursuant to Rules 16(a) (1) (A), (B)
13 and (C).

14 **6. Rule 16(a) (1) (C) and Fed. R. Evid. 404(b): Prior**
15 **Arrests, Convictions Or Bad Acts.**

16 The Government reserves the right to introduce such prior bad
17 acts, and will address such evidence and its intentions in motions in
18 limine to be filed separately according to the Court's scheduling
19 orders.

20 **7. Rule 16(a) (1) (C): Evidence Seized.**

21 In accordance with obligations under Rule 16(a) (1) (C) and 16(c),
22 the Government will permit the Defendant to inspect and copy or
23 photograph all books, papers, documents, photographs, tangible
24 objects, buildings, or places, or portions thereof, which are within
25 or may come within the possession, custody, or control of the
26 Government, and which are material to the preparation of the
27 Defendant's defense or are intended for use by the Government as
28 evidence-in-chief at trial or were obtained from or belong to the

1 Defendant.

2 **8. Henthorn Material**

3 Pursuant to United States v. Henthorn, 831 F.2d 29, 30 (9th Cir.
4 1991), the Government will comply with its responsibilities to review
5 the personnel files of its agents who may serve as witnesses; and the
6 Government will disclose any impeachment information regarding
7 criminal investigations. The Government is presently unaware of any
8 criminal involvement by any prospective government witness, or that
9 any prospective government witness is under investigation. The
10 Government objects to Defendant's request that the Assistant United
11 States Attorney personally review all personnel files of prospective
12 witnesses.

13 **9. Expert Witnesses.**

14 The Government will meet obligations pursuant to Fed. R. Crim.
15 P. 16(a)(1)(E) to disclose information regarding expert witnesses.
16 The Government anticipates presenting testimony of a fingerprint
17 examination expert witness who will identify Defendant's fingerprints
18 on documents from his A-file. The Government will produce details
19 regarding the nature of the expert's testimony, and the qualifications
20 of the expert when a trial date is scheduled and any expert is
21 obtained.

22 **10. Impeachment Evidence.**

23 The Government is unaware of any impeachment evidence of a
24 prospective government witness is biased or prejudiced against
25 Defendant. The Government is aware of, and will comply with, its
26 obligations regarding impeachment evidence pursuant to Brady v.
27 Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97
28 (1976).

1 **11. Evidence of Criminal Investigations of Witnesses.**

2 The Government is currently unaware of any pending criminal
3 investigations against a prospective government witness is biased or
4 prejudiced against Defendant. The Government will comply with its
5 obligations under Brady v. Maryland, 373 U.S. 83 (1963) and provide
6 such evidence if and when it becomes known.

7 **12. Evidence of Bias, Motive to Lie of Government**
8 **Witnesses.**

9 The Government is unaware of any evidence indicating that a
10 prospective government witness is biased or prejudiced against
11 Defendant. The Government is also unaware of any evidence that
12 prospective witnesses have a motive to falsify or distort testimony.
13 The Government is aware of, and will comply with, its obligations to
14 provide such evidence pursuant to Brady v. Maryland, 373 U.S. 83
15 (1963), and United States v. Agurs, 427 U.S. 97 (1976).

16 **13. Evidence of Criminal Investigation of Witnesses**

17 The Government is unaware of any evidence indicating that a
18 prospective government witness is currently under criminal
19 investigation by the Government.

20 **14. Evidence Affecting Perception, Recollection, Ability**
21 **to Communicate, or Veracity.**

22 As addressed in items 12-14 above, the Government is unaware of
23 any evidence affecting the perception, recollection, ability to
24 communicate, or veracity of any prospective Government witness. The
25 Government will provide such evidence pursuant to Brady v. Maryland,
26 373 U.S. 83 (1963), if and when it comes to light.

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1 **15. The Government Is Unaware of Favorable Defense**
2 **Witnesses.**

3 The Government is unaware of any witness who made a favorable
4 statement concerning the Defendant, or of any statement that may be
5 favorable to Defendant's defense, which have not already been provided
6 in discovery.

7 **16. Jencks Act.**

8 Consistent with the Jencks Act, 18 U.S.C. § 3500, the Defendant
9 is not entitled to disclosure of witness statements prior to the
10 witness testifying on direct examination at trial. The Government
11 must produce these statements only after the witness testifies on
12 direct examination. United States v. Taylor, 802 F.2d 1108, 1118 (9th
13 Cir. 1986); United States v. Mills, 641 F.2d 785, 790 (9th Cir.).
14 Indeed, even material believed to be exculpatory and, therefore,
15 subject to disclosure under the Brady doctrine, if contained in a
16 witness statement subject to the Jencks Act, need not be revealed
17 until such time as the witness statement is disclosed under the Act.
18 See United States v. Bernard, 623 F.2d 551, 556 (9th Cir. 1979).

19 The Government reserves the right to withhold the statements of
20 any particular witnesses until after they testify. However,
21 notwithstanding any statements the Government deems necessary to
22 withhold, the Government will disclose witness statements prior to
23 trial in as timely a manner as practicable, provided defense counsel
24 has complied with his obligations under Rules 12.1, 12.2, 16 and 26.2
25 of the Federal Rules of Criminal Procedure, and provided that defense
26 counsel submitted all reciprocal discovery and "reverse Jencks"
27 statements.

28 The Government will comply with its Rule 26.2 obligation to

1 produce for the Defendant's examination statements of witnesses in the
2 Government's possession after, or shortly before, such witnesses
3 testify on direct examination. The Government objects to the
4 Defendant's request that such statements be produced at this time.
5 Similarly, if Rule 12(i) becomes relevant pursuant to suppression
6 proceedings, the Government will comply with obligations to produce
7 statements in accordance with Rule 26.1.

8 **17. The Government Will Comply With Giglio.**

9 The Government has not made any promises, express or implied, to
10 any government witnesses in exchange for their testimony in this case.
11 Therefore, the Government is currently unaware of any discoverable
12 impeachment information pursuant to Giglio v. United States, 405 U.S.
13 150 (1972).

14 **18. Agreements Between the Government and Witnesses.**

15 Consistent with its obligations pursuant to Giglio, stated above,
16 the Government will provide any agreements with witnesses. To date,
17 however, none exist.

18 **19. Informants and Cooperating Witnesses.**

19 Consistent with its acknowledged obligation to provide discovery
20 of prospective witnesses' statements, the Government would provide the
21 requested evidence. To date, however, the Government has not employed
22 any informants or cooperating witnesses in the present case.

23 **B. GRANT LEAVE TO FILE FURTHER MOTIONS**

24 Although the Government does not oppose in principle Defendant's
25 request to file further motions, the Government would oppose the
26 filing of any further substantive motions that would not be
27 entertained by the court until the time set aside for motions in
28 limine. If the defendant foresees the need to file further

1 substantive motions, the Government respectfully requests that the
2 defendant request, and the Court set, a separate date for an
3 additional motion hearing, and that any motions in limine and trial
4 not be set until the conclusion of such hearing.

5 C. THE INDICTMENT SHOULD NOT BE DISMISSED FOR FAILURE TO
6 ALLEGE ESSENTIAL ELEMENTS

7 1. Introduction

8 The indictment returned by the Grand Jury in this case sets forth
9 each of the necessary elements of a 8 U.S.C. § 1326 ("Section 1326")
10 offense. Specifically, the indictment alleges that Defendant
11 (1) is an alien; (2) was deported from the United States; and (3) was
12 found in the United States without the permission of the Attorney
13 General. See United States v. Parga-Rosas, 238 F.3d 1209, 1211
14 (9th Cir. 2001). The indictment in this case sets forth each of these
15 elements, and is therefore valid.

16 The indictment provides notice of the requisite elements of the
17 offense of being found in the United States after deportation. "An
18 indictment is sufficient if it, first, contains the elements of the
19 offense charged and fairly informs the defendant of the charge against
20 which he must defend, and, second, enables him to plead an acquittal
21 or conviction in bar of future prosecutions for the same offense."
22 United States v. Bailey, 444 U.S. 394, 414 (1980) (quotation marks
23 omitted).

24 The Ninth Circuit has specifically held that Section 1326 is a
25 general, rather than specific, intent crime. See United States v.
26 Ortiz-Villegas, 49 F.3d 1435, 1437 (9th Cir. 2000); United States v.
27 Ayala, 35 F.3d 423, 426 (9th Cir. 1994); Pena-Cabanillas v. United
28 States, 394 F.2d 785, 790 (9th Cir. 1968). Again, this conclusion

1 means that no specific intent to voluntarily enter the United States
2 need be alleged in the indictment where the defendant is charged with
3 being "found in" the United States. See United States v. Parga-Rosas,
4 238 F.3d 1209 (9th Cir. 2001).

5 In Parga-Rosas, the Ninth Circuit recognized that Section 1326
6 sets forth three separate offenses for a deported alien: to "enter,"
7 to "attempt to enter," and to be "found in." See id., 238 F.3d at
8 1213. As the Court noted, "we have never suggested that the crime of
9 'entry' must be charged in order to charge the crime of being 'found
10 in.'" Id. In short, for "found in" prosecutions under Section 1326,
11 the indictment need not allege the specific act of entry into the
12 United States. As such, Defendant's motion to dismiss the indictment
13 should be denied.

14 **2. The Indictment Need Not Allege Mens Rea**

15 Defendant argues that the indictment must be dismissed because
16 it fails to allege the mens rea element of the charged offense.
17 Defendant's argument is contrary to United States v. Rivera-Sillas,
18 376 F.3d 887, 891 (9th Cir. 2004), in which the Ninth Circuit rejected
19 Defendant's argument and held that a indictment charging a violation
20 of Section 1326 sufficiently charges general intent where it alleges
21 that a deported alien was subsequently found in the United States
22 without permission. Id., 376 F.3d at 892-93.

23 Unlike attempted entry cases, Section 1326 "found in"
24 prosecutions do not require specific intent. See United States v.
25 Ortiz-Villegas, 49 F.3d 1435, 1437 (9th Cir. 1995) (noting that intent
26 to be in the United States at the moment he or she is located is not
27 necessary); see also United States v. Ayala, 35 F.3d 423, 426 (9th
28 Cir. 1994); Pena-Cabanillas v. United States, 394 F.2d 785, 790 (9th

1 Cir. 1968).

2 In Pena-Cabanillas, the Court noted:

3 The statute in question is not based on any common law
4 crime, but is a regulatory statute enacted to assist in the
5 control of unlawful immigration by aliens. This offense is
6 a typical *mala prohibita* offense, [footnote omitted] and
7 since it denounces the doing of an act as criminal, if a
8 defendant voluntarily does the forbidden act, the law
implies intent. [Cite omitted.] . . . It would be absurd
for this court to think that Congress left 'intent' out of
Section 1326. Since Congress used no words bearing on
specific intent, such an element is not part of the statute
or of the government's burden of proof.

9 394 at 788-90 (emphasis added). Defendant's motion should therefore
10 be denied.

11 Defendant also argues that the indictment must be dismissed
12 because it fails to allege inspection and admission, or actual and
13 intentional evasion of inspection. Again, Defendant's argument is
14 contrary to Ninth Circuit precedent. In Rivera-Sillas, the Court
15 rejected Defendant's identical argument, holding unequivocally that
16 the Government need not plead and prove entry in order to convict a
17 defendant as a Deported Alien Found in the United States. Id., 376
18 F.3d at 892.

19 Defendant also claims that the indictment fails to state an
20 offense under Section 1326 because it fails to allege a voluntary
21 entry into the United States. Again, Defendant's argument is
22 foreclosed by Rivera-Sillas, which definitively held that an
23 indictment alleging that the defendant is a Deported Alien Found in
24 the United States, need not allege voluntary entry.

25 **3. Salazar-Lopez Does Not Require a Different Result**
26 **Because the Indictment Alleges Removal After**
Relevant Conviction Date

27 Defendant points to the Ninth Circuit's recent opinion in United
28 States v. Salazar-Lopez, __ F.3d __, No. 06-50438, 2007 WL 3085906

(9th Cir. Oct. 24, 2007) as support for his argument that the indictment should be dismissed. In Salazar-Lopez, the Ninth Circuit held that Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), bars a defendant convicted under 18 U.S.C. § 1326 from having his statutory maximum sentence increased for prior convictions, unless the indictment alleges "the date of the removal, or at least the fact that Salazar-Lopez had been removed *after* his conviction." Salazar-Lopez, 2007 WL 3085906, at *2. The indictment in the present case specifically alleges that Defendant was removed subsequent to October 15, 2001, the date of his prior aggravated felony conviction.

Defendant argues, nonetheless, that there is no assurance that the grand jury found probable cause regarding the allegation of his prior removal date. Defendant provides no basis or authority for his assertion, which is undermined by the plain-reading of the indictment returned by the grand jury in the present case. Without further support, Defendant's argument should be rejected.

4. Prior Conviction Need Not Be Alleged

As Defendant concedes, the Ninth Circuit has already rejected his argument that his prior conviction must be alleged in the indictment. United States v. Covian-Sandoval, 462 F.3d 1090 (9th Cir. 2006). Because this court is bound by Ninth Circuit precedent, Defendant's argument should be rejected.

D. DEFENDANT'S STATEMENTS AND IDENTITY NEED NOT BE SUPPRESSED, AND NO HEARING IS NECESSARY

1. Defendant's Statements are Admissible

Defendant contends that his statements obtained by Border Patrol agents should be suppressed due to Miranda violations. As indicated above, Defendant admitted he is a citizen of Mexico without proper

1 documents to enter or remain in the United States. Defendant was
2 neither in custody, nor subjected to interrogation by Border Patrol
3 agents at their first encounter.

4 A custodial interrogation is a prerequisite to the attachment of
5 Miranda rights. See Illinois v. Perkins, 496 U.S. 292, 297 (1990)
6 ("It is the premise of Miranda that the danger of coercion results
7 from the interaction of custody and official interrogation."). To
8 determine if a suspect is in custody, a court must assess the
9 objective circumstances of the situation from the prospective of a
10 reasonable person in the suspect's position. See Berkemer v. McCarty,
11 468 U.S. 420, 442 (1984).

12 United States v. Galindo-Gallegos, 244 F.3d 728 (9th Cir. 2001)
13 is instructive here. In Galindo-Gallegos, Border Patrol agents
14 stopped several aliens running near, but north of, the border between
15 the United States and Mexico, and questioned them regarding their
16 citizenship. In determining whether custodial interrogation took
17 place, the Court first noted the following:

18 The material factual circumstances here are that (1) the
19 questioning took place out of doors; (2) the location was
20 isolated, away from view by the general public, but there
21 were 15 or 20 aliens and only two law enforcement
22 officials; (3) no one was handcuffed, but everyone was
23 required to sit on the ground; (4) the questions were a
24 necessary predicate to letting anyone go free, but were
also reasonably likely to elicit incriminating admissions
by those for whom the facts were incriminating; and (5) the
group of aliens had been caught running in an area very
near the border, and Galindo-Gallegos had persisted in
running away from the border patrol but was caught and
returned to the group that had been seated on the ground.

25 Galindo-Gallegos, 244 F.3d at 734. Based on these facts, the court
26 upheld the admission of the statements, without Miranda warnings,
27 because those facts showed a sufficiently public apprehension.

28 Here, the apprehension of the defendant took place in a public

1 place, which is sufficient to "reduce the ability of an unscrupulous
2 policeman to use illegitimate means to elicit self-incriminating
3 statements and diminishes the motorist's fear that, if he does not
4 cooperate, he will be subjected to abuse." Id. (quoting McCarty, 468
5 U.S. at 438). Under both Galindo-Gallegos and Berkemer, therefore,
6 no custodial interrogation occurred.

7 Defendant further ignores that statements made in response to
8 routine investigative questions and on-the-scene questions at the
9 border are admissible. See, e.g., United States v. Leasure, 122 F.3d
10 837, 840 (9th Cir. 1997) (Miranda warnings not required where Customs
11 inspector at border questioned defendant upon entry into the United
12 States); Vickers v. Stewart, 144 F.3d 613, 615 (9th Cir. 1994) (no
13 interrogation when prison guard pulled defendant from scene of the
14 fire and asked what happened). Defendant was asked his citizenship
15 status. This type of questioning is border-related and routine, and
16 does not amount to interrogation as conceptualized in Miranda and its
17 progeny. The statement, therefore, is admissible.

18 **2. Defendant's Request for an Evidentiary Hearing**
19 **Should be Denied**

20 Defendant requests an evidentiary hearing regarding his
21 suppression motion. Under Ninth Circuit and Southern District
22 precedent, as well as a Southern District Local Rule, however, a
23 defendant is entitled to an evidentiary hearing on a motion to
24 suppress only when the defendant adduces specific facts sufficient to
25 require the granting of defendant's motion. See United States v.
26 Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989) (where "defendant, in his
27 motion to suppress, failed to dispute any material fact in the
28 government's proffer, . . . the district court was not required to

1 hold an evidentiary hearing"); United States v. Moran-Garcia,
2 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (boilerplate motion
3 containing indefinite and unsworn allegations was insufficient to
4 require evidentiary hearing on defendant's motion to suppress
5 statements); Crim. L.R. 47.1. There has been no such proffer by
6 Defendant here.

7 Requiring a declaration from a defendant in no way compromises
8 defendant's constitutional rights, as declarations in support of a
9 motion to suppress cannot be used by the government at trial over a
10 defendant's objection. See Batiste, 868 F.2d at 1092 (proper to
11 require declaration in support of Fourth Amendment motion to
12 suppress); Moran-Garcia, 783 F. Supp. at 1271-74 (extending Batiste
13 to Fifth Amendment motion to suppress). Nor is it reasonable to
14 believe that a defendant will have less information than the
15 Government, and so should not be required to provide proof to support
16 a motion. See Batiste, 868 F.2d at 1092. At least in the context of
17 motions to suppress statements, which require police misconduct
18 incurred by Defendant while in custody, Defendant certainly should be
19 able to provide the facts supporting the claim of misconduct. Without
20 such a proffer, no need for an evidentiary hearing has been made.

21 Moreover, any argument that 18 U.S.C. § 3501 requires an
22 evidentiary hearing in every case is of no merit. Section 3501
23 requires only that the Court make a pretrial determination of
24 voluntariness "out of the presence of the jury." Nothing in section
25 3501 betrays any Congressional intent to alter the longstanding rule
26 vesting the form of proof on matters for the court in the discretion
27 of the court. See Batiste, 868 F.2d at 1092 ("Whether an evidentiary
28 hearing is appropriate rests in the reasoned discretion of the

1 district court.") (citation and quotation marks omitted). Therefore,
2 no evidentiary hearing is warranted in this case.

3 The Ninth Circuit has expressly stated that a government proffer
4 based on the statement of facts attached to the complaint is alone
5 adequate to defeat a motion to suppress where the defense fails to
6 adduce specific and material facts. See Batiste, 868 F.2d at 1092.
7 As Defendant has failed to provide a declaration alleging specific and
8 material facts, the Court would be within its discretion to deny
9 Defendant's motion based solely on the statement of facts attached to
10 the complaint in this case, without any further showing by the
11 Government.

12 **III.**

13 **CONCLUSION**

14 Based on the foregoing, the Court should deny Defendant's motion
15 for further discovery, grant Defendant's motion for leave to file
16 further motions, deny Defendant's motion to dismiss the indictment,
17 and deny his motion to suppress statements.

18 DATED: February 4, 2008

19 Respectfully submitted,

20 KAREN P. HEWITT
21 United States Attorney

22 s/ Christopher P. Tenorio
23 CHRISTOPHER P. TENORIO
24 Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 07CR3021-WQH
)
Plaintiff,) **CERTIFICATE OF SERVICE**
)
v.)
)
PEDRO CRUZ-TERCERO,)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED that:

I, CHRISTOPHER P. TENORIO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS** on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Daniel Casillas, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Christopher P. Tenorio
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney